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No. 08-441

IN THE

Supreme Court of the United States

JACK GROSS,
Petitioner,
v.
FBL FINANCIAL SERVICES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of practitioners who represent employees in labor, employ-

[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. Counsel for *amicus curiae* certifies that this brief was not written, in whole or part, by counsel for a party, and that no person or entity, other than *amicus curiae* and counsel, made a monetary contribution to the preparation or submission of the brief. Supreme Court Rule 37.6.

ment and civil rights disputes. NELA and its 68 state and local affiliates have a membership of over 3,000 lawyers nationwide working on behalf of clients with claims of unlawful treatment in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the Court in employment cases actually play out on the ground.

Of particular importance in this case, NELA is intimately familiar with the way in which lower courts deal with the approaches to proof of discrimination embodied in cases such as *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); and *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). Unfortunately, the lower courts continue to reach results out of step with this Court's foundational rulings, with the effect of narrowing the methods of proof that employees may use to prove their claims. NELA is well positioned to suggest remedies for this problem.[2]

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[2] NELA has submitted *amicus curiae* briefs in many recent cases before the Court, including *Crawford v. Metropolitan Gov't of Nashville & Davidson County*, ___ S.Ct. ___ (Jan. 26, 2009); *Sprint/United Management Co. v. Mendelsohn*, 128 S.Ct. 1140 (2008); *CBOCS West, Inc. v. Humphries*, 128 S.Ct. 1951 (2008); *Kentucky Retirement Systems v. EEOC*, 128 S.Ct. 2361 (2008); and *Meacham v. Knolls Atomic Power Laboratory*, 128 S.Ct. 2395 (2008). NELA also filed an *amicus* brief in *Desert Palace*, as well as a brief at the petition stage in the present case, supporting petitioner's request for *certiorari*.

SUMMARY OF ARGUMENT

Flexibility is the hallmark of this Court's approach to proof in EEO cases. The Court's very first protocol for analyzing Title VII evidence, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), came with a warning: "[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from [plaintiff] is not necessarily applicable in every respect to differing factual situations." *Id.* at 802 n.13.

The method set forth in *McDonnell Douglas*, and the many cases refining it, helps to sort out an unlawful motive from legal reasons for the same action. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), simply captured situations where sorting out the illegal motive was more difficult, because the employee's protected status blended with other reasons to motivate the adverse action. In those situations, the Court held, the burden shifted to the employer to disprove that the protected status was a factor. This was consistent with the familiar principle requiring the tortfeasor to shoulder the burden on causation, where it would be unreasonable to require the injured party to tease out the concurrent factors.

Price Waterhouse did not hold that there were two mutually exclusive means of proving an EEO claim—*McDonnell Douglas* and *Price Waterhouse*. Nevertheless, many lower courts, including the Eighth Circuit in this case, insist that proof be rigidly compartmentalized into two discrete categories. They have posited a dichotomy where none exists and hold that plaintiffs need direct evidence to avail themselves of *Price Waterhouse*. Only a few plaintiffs, though, can point to admissions or their

like, and all others are remitted to *McDonnell Douglas*.

In *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983), the Court alluded to the difficulty of obtaining direct evidence, noting that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." There is no warrant for requiring direct evidence in any aspect of EEO litigation, especially in light of "the basic standard of relevance" in federal courts, which the Court has recognized "is a liberal one." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993).

Part of this problem stems from imprecise terminology. Courts speak of *Price Waterhouse* as applying to "mixed motive" cases. But virtually all EEO cases involve a mixture of motives, including those properly analyzed under *McDonnell Douglas*. *See, e.g.*, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). The *number* of co-existing motives is not an accurate way to classify cases subject to *Price Waterhouse*.

More ominous, many courts—including the *en banc* Ninth Circuit whose judgment this Court affirmed in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003)—see the converse of "mixed motive" as "sole motive." The result is to impose an unduly harsh burden on plaintiffs even in classic *McDonnell Douglas* cases.

Rather than continuing to use "mixed motive" as a term of art, it is more appropriate to adopt the language used by Congress and call these "same action" cases. *See* 42 U.S.C. § 2000e-5(g)(2)(B). Unlike "mixed motive," "same action" highlights the salient feature that actually distinguishes *Price*

Waterhouse cases: the burden of proof shifts to the defendant to show that it would have made the same decision in a bias-free setting.

Regardless of terminology, direct evidence should not be permitted to provide a gate-keeping function for *Price Waterhouse*. Circumstantial proof – which may be "more certain, satisfying and persuasive than direct evidence," *Desert Palace*, 539 U.S. at 100 – is sufficient.

ARGUMENT

I. THE LOWER COURTS HAVE CREATED A FALSE DICHOTOMY BETWEEN *McDONNELL DOUGLAS* AND *PRICE WATERHOUSE*

The Age Discrimination in Employment Act (ADEA), like other civil rights statutes, does not limit a plaintiff to any particular method of proof, provided that the employee establishes workplace discrimination "because of such individual's age." 29 U.S.C. § 623(a)(1). This key language is not limited to a single theory of proof, as this Court recently reaffirmed. *Meacham v. Knolls Atomic Power Laboratory*, 128 S. Ct. 2395, 2403 (2008) (same statutory language also supports a disparate impact theory under the ADEA).

A generation ago, in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), the Court blazed one trail for the Title VII plaintiff to make out a prima facie case:

> by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications,

> he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications

The Court has continued over the decades to refine the order and allocation of proof under Title VII and the ADEA. *See, e.g., Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 143 (2000); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509-12 (1993); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). The method as set forth in these cases helps to sort out a discriminatory (or retaliatory) motive from other, possibly legal reasons for the same action. *See, e.g, Wilkie v. Robbins*, 127 S. Ct. 2588, 2601 (2007) ("we have established methods for identifying the presence of an illicit reason (in competition with others), not only in retaliation cases but on claims of discrimination based on race or other characteristics"); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (1993) (*McDonnell Douglas*, as applied to ADEA, is meant to separate age from non-age-related factors in an adverse action).

Price Waterhouse was not meant to depart from this well-hewn line of cases, but to capture situations where sorting out the illegal motive was more difficult. *Price Waterhouse* itself was a particularly illustrative example of this phenomenon, since it involved a collective decision in which many actors had inputs—some of which were discriminatory—and it was difficult to discern which actors were heard

and to what effect. *See* 490 U.S. at 245-46 (plurality decision); *id.* at 260 (White, J., concurring in the judgment); *id.* at 278 (O'Connor, J., concurring in the judgment).

A majority of the Court held that where the employee's protected status blended with other reasons to motivate the adverse action, the burden shifted to the employer to disprove that the protected status was a factor. *Id.* at 241 (plurality decision) ("we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations"); *id.* at 260 (White, J. concurring in the judgment) (because "the District Court found that the employer was motivated by both legitimate and illegitimate factors," plaintiff "was not required to prove that the illegitimate factor was the only, principal, or true reason for petitioner's action"); *id.* at 273 (O'Connor, J., concurring in the judgment) (where different factors influenced the decision, "requiring the plaintiff to prove that any one factor was the definitive cause of the decisionmakers' action may be tantamount to declaring Title VII inapplicable to such decisions").

Following *Price Waterhouse*, of course, Congress enacted particular rules for Title VII claims that recognize proof of a prohibited "motivating factor," as well as the relief available when the defendant proves the "same action" would have been taken anyway. *See* 42 U.S.C. §§ 2000e-2(m) and -5(g)(2)(B). *See, e.g., Desert Palace v. Costa*, 539 U.S. 90, 98-99 (2003).

The *Price Waterhouse* shift followed the familiar path of requiring the tortfeasor to carry some or all of the burden on causation, where it would be unreasonable to require the injured party (who often

lacks access to critical information) to comb out possible concurrent factors. This scheme is often followed in tort and statutory law. *See, e.g., de Bazan v. Secretary of Health and Human Services*, 539 F.3d 1347, 1352 (Fed. Cir. 2008) (under National Childhood Vaccine Injury Act, once petitioner proves that vaccine was cause-in-fact of injury, burden shifts to the government to prove by a preponderance of the evidence that the claimant's injury is due to factors unrelated to the administration of the vaccine); *Lippoldt v. Cole*, 468 F.3d 1204, 1219 (10th Cir. 2006) (under § 1983, "[i]n a case of concurrent causation, the burden of proof shifts to the defendants in that 'a tortfeasor who cannot prove the extent to which the harm resulted from other concurrent causes is liable for the whole harm' because multiple tortfeasors are jointly and severally liable") (citation omitted); *Doe v. Baxter Healthcare Corp.*, 380 F.3d 399, 407 (8th Cir. 2004) (under Iowa products-liability law, the "plaintiff still must show that one of the defendants caused his injury, but 'the burden of proof as to which actor caused the harm shifts to the defendants because there is uncertainty as to which of them caused the injury'") (citation omitted).

It was never supposed—in any opinion filed in *Price Waterhouse*—that there would henceforth be just two mutually exclusive means of proving any discrimination claim. The *McDonnell Douglas* protocol itself is flexible and was "'never intended to be rigid, mechanized, or ritualistic.'" *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512 (2002), *quoting Waters*, 438 U.S. at 577; *see also Aikens*, 460 U.S. at 715. This flexibility allows the court and parties to conform the proof to the distinct factual patterns unique to a particular case, because "[t]he facts necessarily will vary in Title VII cases, and the

specification . . . of the prima facie proof required from [plaintiff] is not necessarily applicable in every respect to differing factual situations." *McDonnell Douglas*, 411 U.S. at 802 n.13.

Despite this Court's admonitions, *McDonnell Douglas* has indeed become our Book of Common Prayer. It has been "consistently utilized" by the lower courts "when reviewing motions for summary judgment in disparate-treatment cases." *Raytheon Co. v. Hernandez*, 540 U.S. 44, 49 n.4 (2003). The courts of appeals unceasingly intone that plaintiffs without direct evidence are remitted to some version of *McDonnell Douglas* burden shifting. *See, e.g., Royall v. National Ass'n of Letter Carriers, AFL-CIO*, 548 F.3d 137, 144 (D.C. Cir. 2008) ("[t]he burden-shifting framework set out in [*McDonnell Douglas*] . . . applies to § 1981 employment discrimination claims where, as here, there is no direct evidence that prohibited discrimination caused the adverse employment action"); *Martin v. Brevard County Public Schools*, 543 F.3d 1261, (11th Cir. 2008) (under FMLA, "[a]bsent direct evidence of retaliatory intent, we apply the burden-shifting framework established in [*McDonnell Douglas*]") (footnote omitted); *Morgan v. A.G. Edwards & Sons, Inc.*, 486 F.3d 1034, 1042 (8th Cir. 2007) ("two methods" of proof under the ADEA: "[t]he plaintiff may present direct evidence that age was a motivating factor in the challenged employment decision," or "[i]n the alternative, the plaintiff may rely on the three-stage proof scheme established in [*McDonnell Douglas*]"). Creating this dichotomy between *McDonnell Douglas* and *Price Waterhouse* is error, unsupported by the Court's decisions.

The methods of proving individual claims of disparate treatment under the ADEA and other

statutes are not rigidly compartmentalized, as the Court has recognized. Instead, the proof required in a particular case depends on the circumstances presented. *See, e.g., Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140, 1147 (2008) (rejecting *per se* admissibility rule with respect to trial witnesses; "[t]he question whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case"). By way of example, the Seventh Circuit has shown that any number of paths—limited only by the imagination of counsel—may lead to proving discrimination. *Sylvester v. SOS Children's Villages Illinois, Inc.*, 453 F.3d 900, 903 (7th Cir. 2006) (Posner, J.) ("[a] case of discrimination can likewise be made by assembling a number of pieces of evidence none meaningful in itself, consistent with the proposition of statistical theory that a number of observations each of which supports a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction") (*citing Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 737 (7th Cir.1994)). In matters of proof, flexibility is the watchword.

It is true that this Court said in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985), that "the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination." But there the Court meant that there was no need for resort to inferences when the challenged policy itself *facially* violated the act ("[s]ince it allows captains who become disqualified for any reason other than age to 'bump' less senior flight engineers, TWA's transfer policy is discrimi-

natory on its face"; *id.*). The Court had no occasion in *Thurston* to consider what other evidence might be used to prove discrimination. *See also Kentucky Retirement Systems v. EEOC*, 128 S. Ct. 2361, 2369 (2008) ("a statute or policy that facially discriminates based on age suffices to show disparate treatment under the ADEA").

The current of this Court's cases under the ADEA —as with all cases construing the federal anti-discrimination acts—has been to reject the lower courts' interposition of additional, straitened or elevated burdens of proof on employees, at least where Congress has not demanded them. *See, e.g., Meacham v. Knolls Atomic Power Laboratory*, 128 S. Ct. 2395, 2401-03 (2008) (rejecting employer's attempt to shift burden of "reasonable factor other than age" to employee); *Reeves*, 530 U.S. at 146-49 (rejecting a "pretext-plus" requirement); *O'Connor*, 517 U.S. at 311-12 (rejecting requirement that an ADEA plaintiff be replaced by another less than age 40); *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 419-20 (1985) (employer entitled to no special deference under "bona fide occupational qualification" defense).

Here, in contrast, the Eighth Circuit and the respondent erroneously insist upon a binary mode of analysis not compelled by the ADEA itself or this Court's interpretation of that act. The Court should not accept it.

II. CIRCUMSTANTIAL PROOF IS AS RELEVANT AS DIRECT EVIDENCE, AND THE COURT DOES NOT FAVOR DISTINCTIONS BETWEEN DIFFERENT KINDS OF RELEVANT EVIDENCE

The petitioner's brief and those of other *amici* thoroughly canvass the interplay of *Desert Palace* and *Price Waterhouse*, demonstrating that the Eighth Circuit erred in concluding that "direct evidence" is a prerequisite under the ADEA—as a matter of substantive employment discrimination law—to shifting the burden on the issue of causation. The National Employment Lawyers Association agrees with this analysis and spares its further iteration here.[3]

Instead, NELA adds a further point from the vantage point of trial lawyers—that the Eighth Circuit's and respondent's rule would cut against the grain of "the basic standard of relevance" prevalent in

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[3] The Eighth Circuit simply adopted Justice O'Connor's preference for direct evidence, having concluded that her concurring opinion in *Price Waterhouse* controlled the case. *Gross v. FBL Financial Services, Inc.*, 526 F.3d 356, 359-60 (8th Cir. 2008). Petitioner has shown why this is not so, since a majority of the Court did not see direct evidence as required. Brief for Petitioner at 52-55. Justice O'Connor's role in *Price Waterhouse* was not at all akin to the situation in *Oregon v. Mitchell*, 400 U.S. 112 (1970), in which a single justice – Justice Black—truly controlled, siding with four members of the Court on the question whether Congress could lower the voting age to 18 in federal elections, and with the other four on whether Congress possessed like authority in state and local elections. In any event, the Court has long recognized that "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Desert Palace*, 539 U.S. at 100, *quoting Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508 n.17 (1957).

federal courts, which this Court has recognized "is a liberal one." *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 587 (1993). The "direct evidence" standard simply demands too much of plaintiffs to survive scrutiny. An employee age 40 or over, under the general admissibility standards of Fed. R. Evid 401 and 402, ought to be able to introduce any evidence that makes it more likely than not that the mistreatment alleged was "because of" age. 29 U.S.C. § 623(a)(1).

A standard of admissibility begins with the fundamental question of whether a particular kind of evidence is more likely to make a material fact true. Fed. R. Evid. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). Thus, the Court rejected a "screening test" to sift out the use of mitigating character evidence in the sentencing phase of a capital murder prosecution. *Tennard v. Dretke*, 542 U.S. 274, 284 (2004). The Court, referring to Rule 401, held that "the 'meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding' than in any other context, and thus the general evidentiary standard." *Id.* (*quoting McKoy v. North Carolina*, 494 U.S. 433, 440-441 (1990)). The Court likewise deemed admissible the dilutive impact of a reorganization plan under Section 5 of the Voting Rights Act, holding that it was relevant even though it did not by itself prove the intent to discriminate. *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 487 (1997) ("[t]he fact that a plan has a dilutive impact therefore makes it more probable that the jurisdiction adopting that plan acted with an intent to

retrogress than it would be without the evidence") (internal quotations deleted).

We never require—whether in life at large or in court—that a particular kind of evidence conclusively establish a fact all by itself. *See, e.g., Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 631-32 (1989) (even if a urine test is not conclusive about an employee's impairment, "if urine test results disclosed nothing more specific than the recent use of controlled substances by a covered employee, this information would provide the basis for further investigative work designed to determine whether the employee used drugs at the relevant times"); *New Jersey v. T.L.O.*, 469 U.S. 325, 345 (1985) ("evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have 'any tendency to make the existence of any fact that is of consequence to the determination [of the point in issue] more probable or less probable than it would be without the evidence'") (*quoting* Fed. R. Evid. 401).

The strength of the evidence is not typically the province of the court, but is the subject of examination at trial. So the Court observed in *Daubert*, 509 U.S. at 596, when it abolished the "general acceptance" hurdle (*i.e.*, the *Frye* test) to admissibility of expert scientific evidence under Fed. R. Evid. 702:

> Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. . . . These conventional devices, rather than wholesale exclusion under an uncompromising 'general acceptance' test, are the appropriate

> safeguards where the basis of scientific testimony meets the standards of Rule 702.

Id. (citations omitted).

It is most certainly error (as here) for a court to assign priority to particular categories of evidence, and by extension to disregard evidence of a seemingly lesser stripe. *Reeves*, 530 U.S. at 146 (court of appeals erroneously "confined its review of evidence favoring petitioner to that evidence showing that Chesnut had directed derogatory, age-based comments at petitioner, and that Chesnut had singled out petitioner for harsher treatment than younger employees. . . . It is therefore apparent that the court believed that only this additional evidence of discrimination was relevant to whether the jury's verdict should stand").

The Court observed in *Aikens*, 460 U.S. at 716, that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." The Court should not demand the impossible from plaintiffs and should reject the "direct evidence" threshold.

III. "MIXED MOTIVE" IS AN INACCURATE AND CONFUSING TERM

Use of the term "mixed motive" to categorize those cases in which the *Price Waterhouse*/*Desert Palace* approach is invoked is a misnomer, because these cases do not differ from others in the *number* of motives that may coexist. Virtually all EEO cases involve mixed motivation, because a person's actions are rarely animated by a single motive. Certainly *Burdine*'s burden-shifting paradigm was not intended only for "single motive" cases.[4] The genius of *Burdine*

[4] First, the plaintiff employee must establish a prima facie case of discrimination; the defendant employer must then

is that it "progressively . . . sharpen[s] the inquiry into the elusive factual question of intentional discrimination," 450 U.S. at 255 n.8, and channels "the factual inquiry . . . to a new level of specificity," *id.* at 255, in which the plaintiff's *prima facie* showing of bias is pitted against the employer's plausible nondiscriminatory rationale. In the end, the trier of fact (typically a jury) "must decide which party's explanation of the employer's motivation it believes." *Aikens*, 460 U.S. at 716. Where the jury concludes that the employer's proffered explanation is not believable, it may (but need not) infer that the real reason was unlawful. *Reeves*, 530 U.S. at 147.[5]

More than a decade before the phrase "mixed motive" was used in *Price Waterhouse*, this Court recognized that Title VII is violated when an

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respond by articulating one or more lawful reasons for the challenged conduct; and finally the plaintiff has the opportunity to prove that one or more of the articulated rationales is not true and is instead a "pretext" for bias. *See Burdine*, 450 U.S. at 452-53.

[5] In this regard, a showing that the employer's reason is pretextual is not necessarily the same as showing that it is factually false. For example, an employer may claim that it fired a long-time employee because she was 10 minutes late to work – the week after she filed an EEO complaint. A factfinder could find that the employee was truly 10 minutes late and still find that the proffered reason was not the real explanation for the employer's decision to fire her. The Sixth Circuit has succinctly summarized the various permutations of prextext as: (1) the proffered reason has no basis in fact, (2) the proffered reason—even if true—did not actually motivate the employer's decision, or (3) the proffered reason was insufficient to warrant the challenged decision. *Johnson v. Kroger Co.*, 319 F.3d 858, 866-867 (6th Cir. 2003). It is this third category—a motivation that is true but insufficient by itself—that covers the presence of multiple motives.

unlawful motivation joins with one or more lawful considerations to cause harm. In *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), two white employees were fired for theft while an African-American worker, who participated in the theft with them, was retained. *Id.* at 276. The Court did not doubt that theft was a valid basis for firing but ruled that the whites could prove that their employer discriminated by showing that their race caused the disparity in the discipline imposed: "while crime or other misconduct may be a legitimate basis for discharge, it is hardly one for racial discrimination." *Id.* at 283. The employer could have fired all three employees for being involved in the theft, but the factfinder was permitted to infer that the theft was not sufficient to explain the disparity in treatment, and that race was.

In *Santa Fe Trail*, the Court quoted *McDonnell Douglas*, 411 U.S. at 804, as saying that Title VII does not "permit (the employer) to use (the former employee's) conduct as a *pretext* for the sort of discrimination prohibited by (the Act)." 427 U.S. at 282 (emphasis added). The Court addressed the multiple motives issue directly by noting that "[t]he use of the term 'pretext' in this context does not mean, of course, that the Title VII plaintiff must show that he would have in any event been rejected or discharged *solely* on the basis of his race, without regard to the alleged deficiencies." *Id.* n.10 (emphasis added).

Santa Fe Trail illustrates the first problem with use of "mixed motive" terminology: it is simply not accurate. Second, use of the term causes mischief because the converse of mixed motive is seen by some courts as "*sole* motive," imposing an extraordinarily

difficult—and unwarranted—burden on plaintiffs. *See, e.g., Ginger v. District of Columbia*, 527 F.3d 1340 (D.C. Cir. 2008), *reh'g en banc denied* (Jul. 31, 2008), *cert. denied*, ___ S.Ct. ___ (Jan. 12, 2009), in which the D.C. Circuit said:

> There are two ways of establishing liability in a Title VII case. A plaintiff may pursue a "single-motive case," in which he argues race (or another prohibited criterion) was the *sole* reason for an adverse employment action and the employer's seemingly legitimate justifications are in fact pretextual. * * * Alternatively, he may bring a "mixed-motive case," in which he does not contest the *bona fides* of the employer's justifications but rather argues race was also a factor motivating the adverse action.

Id. at 1345 (emphasis added).

Even the Ninth Circuit in *Costa v. Desert Palace, Inc.*, 299 F.3d 838 (9th Cir. 2002) (*en banc*), whose judgment was affirmed by this Court in *Desert Palace*, contrasted *Price Waterhouse* situations with those in which "discriminatory animus is the *sole* cause for the challenged employment action." *Id.* at 856 (emphasis original). *See also Sher v. Dept. of Veterans Affairs*, 488 F.3d 489, 508 n.22 (1st Cir. 2007) ("In a mixed motive case, the plaintiff would only have to establish that national origin or religious discrimination was a motivating factor in the analysis, rather than the *sole* basis for the decision.") (emphasis added).

Rather than continuing to use "mixed motive" as a term of art to refer to cases subject to *Price Waterhouse*, it is more appropriate to adopt the language used by Congress and call these "same

action" cases. *See* 42 U.S.C. § 2000e-5(g)(2)(B), which governs the availability of Title VII relief when the plaintiff has proved that discrimination was a motivating factor, and defendant shows it "would have taken the *same action* in the absence" of discrimination (emphasis added). *See also Village of Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252, 270 n.22 (1977) (proof that race was a motivating factor would "have shifted to the Village the burden of establishing that the *same decision* would have resulted even had the impermissible purpose not been considered") (emphasis added).

Unlike "mixed motive," "same action" highlights the salient feature that actually distinguishes *Price Waterhouse* cases: the burden of proof shifts to the defendant to show that it would have made the same decision in a bias-free setting.

CONCLUSION

The judgment of the Court of Appeals should be vacated and the case remanded.

Respectfully submitted,

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